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IN THE

Supreme Court of the United States

October Term, 1971
No. 68-5027

EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

Brief Amicus Curiae of the Committee of Psychiatrists for Evaluation of the Death Penalty.

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Statement of Interest of the Amicus.

The Committee of Psychiatrists for Evaluation of the Death Penalty filing this brief amicus curiae is composed of practicing psychiatrists who also have major responsibility for developing new knowledge about human nature and for educating others in the most advanced degrees of psychiatric thought.[1] Many of these psychiatrists have had direct experience with men sentenced to death. Because psychiatrists are regularly called upon to testify in cases involving the death penalty and to certify the sanity of men sentenced to death, they are in a position to bring before this Court some views of the nature and effect of the death sentence which might not be stressed by other parties.

Consent of the parties for the filing of this brief amicus curiae has been sought and obtained. Copies of the parties' letters will be submitted to the Clerk with this brief.

[1]See Appendix for list of psychiatrists composing the Committee.

ARGUMENT.

I.

Capital Punishment Constitutes Cruel and Unusual Punishment Because of the Psychological Torture Which It Inflicts.

In *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), this Court held that the crux of the Eighth Amendment is its prohibition of "inhuman treatment" and its incorporation of a maturing society's "evolving standards of decency." The Court recognized that the protection of the Amendment extends far beyond primitive tortures; it prohibits any punishment which violates "the principle of civilized treatment." *Id.* at 99.

In *Trop* the Court ruled that denationalization was a cruel and unusual punishment for desertion. In so ruling, the Court based its finding of cruelty largely upon the extreme psychological pain which such a punishment inflicted. The plurality opinion of the Chief Justice stated that denationalization was offensive to the cardinal principles of the Constitution because it "subjects the individual to a fate of ever-increasing fear and distress." *Id.* at 102. The concurring opinion of Mr. Justice Brennan, which was necessary for a majority, stated that "(t)he uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment." *Id.* at 111.

In the psychological pain it inflicts upon men waiting to be executed, capital punishment far exceeds denationalization as inhuman treatment. Indeed, the psychological effects of the death sentence are really an *additional* punishment that is cruel and inhumane in itself. It is an important aspect of capital punishment

that a man sentenced to death does not simply lose his life. He is also subjected, during his last months or years, to a psychological punishment perhaps worse than his execution.

Psychiatrists, wardens and others who have had direct contact with condemned men have documented the brutal mental deterioration of men on death row.[2] Dr. Louis J. West has noted that

> "A good many of these doomed men end up in the hands of the psychiatrist. The strain of existence on Death Row is very likely to produce behavioral aberrations ranging from malingering to acute psychotic breaks." L. J. West, "A Psychiatrist Looks at the Death Penalty," paper presented at the 122nd Annual Meeting of the American Psychiatric Association, May 11, 1966.

Those prisoners who escape psychosis frequently experience other reactions to the stress of impending death: insomnia, withdrawal, depression, paranoia, obsessive rumination, anxiety and delusions.[3] The damage is increased by the steadily lengthening time which prisoners spend on death row. The average time spent under death sentence was 16 months as of 1960; as of 1965 it was nearly *four years.*[4]

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[2]For case studies, see C. Duffy, *The San Quentin Story* (1950); *88 Men and 2 Women* (1962); G. Gottlieb, *Capital Punishment* (Center for the Study of Democratic Institutions 1967).

[3]For a description of actual cases involving these reactions, see Bluestone and McGahee, "Reaction to Extreme Stress: Impending Death by Execution," 119 Am. J. of Psychiatry 393 (Nov. 1962)

[4]H. Bedau, "The Courts, the Constitution, and Capital Punishment," 1968 Utah L. Rev. 201, 224. Bedau notes that there are prisoners who have been on death row for more than 14

(This footnote is continued on next page)

This psychological anguish is inherent in the idea of imprisoning men to await certain death. Hence, it cannot be diminished even though more "efficient" or "humane" ways of killing are developed. Dr. Isidore Ziferstein has concluded:

> "In less 'civilized' societies the slow torture of the condemned man was an important part of the execution. Procedures like crucifixion were public, and they inflicted prolonged torture. They were rationalized by the magical assumption that the condemned man's suffering might purify his soul and might lead to repentance before he finally died. These sadistic spectacles were also rationalized as socially valuable deterrents.
>
> "Modern techniques of execution have aimed at minimizing the physical pain of dying (although we do not really know how much pain is experienced in electrocution or execution by gas). *But these modern techniques have retained to the fullest the exquisite psychological suffering of the condemned man.*" Ziferstein, "Crime and Punishment," Center Magazine 84 (January 1968) (emphasis added).

The suffering of the condemned man is aggravated by his knowledge that the death penalty is rarely ap-

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years, and concludes: "there is every reason to expect that during the next decade, unless the death penalty is abolished or radical procedural reforms are introduced, it will be commonplace for persons to spend between five and ten years under death sentence before final disposition of their cases." Id. The possibility that the average length of time on death row may have been increased in part because of the condemned prisoners' own appeals does not justify the increased psychological anguish involved. It would be strange if a prisoner were held "estopped" to challenge his punishment as cruel and unusual because he had exercised fully his rights of review.

plied, that the wealthy and influential are relatively safe from it, and that many states and nations have already abolished it. Accidents of circumstance, time, and geography thus appear, almost frivolously, to be determinants in the loss of his life. The irrevocability of that punishment means that no subsequent change in circumstance or law can possibly be of benefit to him, so that even the thin sustenance of hope is lost.

Furthermore, the person awaiting legal execution today lives in a time when the sacred quality and value of human life have been increasingly recognized and protected by law. The condemned man awaits extermination by the state under conditions in which no *individual* would be morally or legally justified in taking a life. Under modern conventions even an enemy soldier in combat, once captured and subdued, may not be killed. The moral and legal precept that *no man has the right to kill a helpless captive* is now sufficiently universal that the condemned prisoner suffers the additional anguish of realizing that the state, coldly and impersonally, will commit against him an act denied to any individual, regardless of passion or provocation.

These psychological cruelties inherently accompany the institution of capital punishment. In and of itself, the taking of life may constitute the "inhuman treatment" which the Eighth Amendment prohibits. But coupled with the extreme psychological suffering which precedes it, extending over an average of four years, capital punishment surely violates standards of decency and civilized treatment.

II.

Capital Punishment Serves No Legitimate State Purpose Which Could Not Be Achieved by Other Means.

Where important consitutional rights are involved, a state cannot justify their infringement without a showing of a *compelling* state interest. *Sherbert v. Verner*, 374 U.S. 398 (1963) (freedom or religion); *NAACP v. Button*, 371 U.S. 415 (1963) (freedom of expression); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel). Such a showing cannot be made where there are other, less harsh means to achieve the state's purpose. *Shelton v. Tucker*, 364 U.S. 479 (1960). The state must employ available, "less drastic means" where they adequately protect the interest involved. *Id.* at 488.

The legitimate governmental interests in the punishment of criminals are (1) rehabilitation, (2) isolation, and (3) deterrence. See *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (Goldberg, J. dissenting). Of these interests, the first is obviously irrelevant to capital punishment and the second is served equally by capital punishment or life imprisonment. Regarding the third interest, not only is there no evidence that capital punishment is an effective deterrent, but there is also a body of psychological evidence suggesting that capital punishment is an *incentive* to violence.

No study has yet shown that capital punishment deters crime.[5] One reason is that crimes are committed for reasons other than a rational weighing of conse-

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[5]See *The Death Penalty in America*, 588-332 (H. Bedau, ed. 1964); United Nations Department of Economic and Social Affairs, *Capital Punishment*, (ST/SOA/SD/9-10) 123 (1968); President's Commission on Law Enforcement and Administration of Justice, *Report* (*The Challenge of Crime in a Free Society*) 143 (1967).

quences. To the extent criminals anticipate the consequences of their conduct, they do so in terms of whether or not they will be caught. They do not commit crimes after deciding that, on balance, the punishment seems fairly light for the crime contemplated.[6] Thus there is not only no statistical support for the belief that capital punishment deters crime more effectively than life imprisonment, but there is no psychological reason for believing that it would so function. Even assuming that there is an appreciable difference to criminals between capital punishment and life imprisonment, it is not the kind of consideration which would determine whether a crime of violence would be committed.

On the other hand, strong psychological reasons exist for believing that capital punishment serves to legitimize killing as a solution to human problems and actually to incite certain warped mentalities to kill. Dr. West and Professor Thorsten Sellin have described the phenomenon of attempting suicide by committing a murder: documented murders which have been committed by abnormal persons out of a conscious or unconscious desire to be put to death by society.[7]

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[6]See the responses of phychiatrists to a survey on capital punishment reported in Cohen, "Psychiatrists Look at Capital Punishment," 29 Psychiatry Digest 45, 49 (Feb. 1968). The former Chief of Service of the Psychiatric Clinic at Sing Sing Prison concluded that

> "The fallacy here [in the desire for capital punishment] is that the real murderer, in the act of killing, does not think of the consequences. The desire for control or reassurance comes only to the 'average citizen'—. . ."

Statement by Dr. Yves J. Kron, "The Citizen and Capital Punishment" printed by the New York Committee to Abolish Capital Punishment.

[7]West, *supra,* at 3-4; T. Sellin, *The Death Penalty* (1959).

The existence of capital punishment, moveover, represents an official sanction of violence and revenge that cannot help but brutalize societal values. Thus, even if it is rarely exercised, the dealth penalty provides a model that apparently stimulates more homicides than it deters. These considerations prompted the Board of Trustees of the American Psychiatric Association, the oldest continuing national medical society in the United States, with a membership of over 17,000 psychiatrists, to adopt the following resolution on December 12, 1969:

> "Resolved that the American Psychiatric Association, through its Board of Trustees, opposes the death penalty and calls for its abolition. The best available scientific and expert opinion holds it to be anachronistic, brutalizing, ineffective and contrary to progress in penology and forensic psychiatry."

The American Psychiatric Association went on to file a brief amicus curiae before this Court in which various illustrations were given to show how the death penalty, far from serving as a deterrent, ". . . may actually serve as an incitement to crime among various types of mentally unstable potential offenders." Brief for American Psychiatric Association as Amicus Curiae at 6-7, *Maxwell v. Bishop*, 398 U.S. 262 (1970).

Conclusion.

The extreme psychological suffering inherent in capital punishment renders it cruel and unusual punishment. The existence of alternative methods to achieve the stated purposes of capital punishment makes it impossible to

justify in terms of legitimate governmental interests. In fact it probably incites more homicides than it deters. For these reasons, amicus submits that the judgment of the Supreme Court of California should be reversed.

Dated: August 26, 1971.

Respectfully submitted,

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